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February 28, 2008

Writer's Direct Contact
415.268.6294
RFalk@mofo.com

By Overnight Delivery

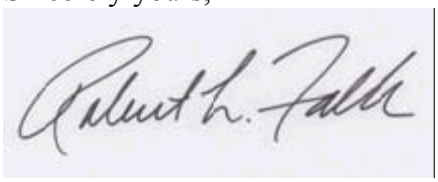
MRP Tentative Order Comments
Attn. Dale Bowyer
S.F. Bay WaterBoard
1515 Clay Street, Suite 1400
Oakland, California 94612

Re: **Public Comment Submission regarding Tentative Order on Municipal Regional Stormwater NPDES Permit**

Dear Dale:

Enclosed please find hard copies of Morrison & Foerster's Legal Comments (Nos. 1 and 2) being submitted for public comment and response on behalf of the Santa Clara Valley Urban Runoff Pollution Prevention Program and its co-permittees. (These comments have also been provided via email.) As you will see, the enclosed also incorporates by reference additional comments being provided by SCVURPPP, its co-permittees, BASMAA, other Bay Area countywide stormwater programs and their co-permittees, and additional legal comments being submitted by Gary Grimm under separate cover.

Sincerely yours,



Robert L. Falk

Enclosures

cc via email:

SCVURPPP Management Committee
BASMAA Executive Board
Adam Olivieri
Gary Grimm

MEMORANDUM

TO: San Francisco Regional Water Quality Control Board

FROM: Morrison & Foerster LLP on behalf of the Santa Clara Valley Urban Runoff Pollution Prevention Program and its Co-Permittees

DATE: February 28, 2008 FILE: 43117-1

RE: **Legal Comment (No. 1) Concerning Unfunded State Mandates Contained in Proposed Municipal Regional (Stormwater) Permit**

The following comment concerning the presence of numerous unfunded State mandates contained in the proposed Municipal Regional Permit is being submitted on behalf of the Santa Clara Valley Urban Runoff Pollution Prevention Program and its 15 members who are designated as co-permittees.[1, 2]

I. THE TENTATIVE ORDER CONTAINS NUMEROUS UNFUNDED STATE MANDATES

The Tentative Order contains numerous unfunded State mandates. Unless funding is provided for the implementation by local governments of these aspects of the Municipal Regional Permit, they will violate Article XIIIB, Section 6, of the California Constitution.[3] To avoid the effective suspension or removal of these requirements from the permit by the Commission on State Mandates or, if necessary, the State's courts, the Regional Board should: (1) direct staff to revise those aspects of the Municipal Regional Permit that exceed federal minimum requirements in a manner reflective of a consensus with local governments concerning priority-setting and phasing over time, or (2) absent the achievement of such a consensus, otherwise condition the effectiveness of such discretionarily imposed stormwater

[1] The co-pemittees are: Campbell, Cupertino, Los Altos, Los Altos Hills, Los Gatos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, Sunnyvale, Santa Clara County, and the Santa Clara Valley Water District.

[2] The Santa Clara Program will be submitting additional comments under its own letterhead, and its 15 members who are co-permittees may be submitting separate programmatic, technical, and/or legal comments as well. All of these, and any comments submitted by other Bay Area municipal stormwater programs and co-permittees (and/or their legal counsel) and the Bay Area Stormwater Management Agencies Association (BASMAA), are hereby incorporated by reference.

[3] Section III of this comment contains a more detailed discussion of the legal framework surrounding these State unfunded mandate issues and addresses the erroneous and inappropriate legal analysis of them set forth in the so-called "Fact Sheet" circulated by the Regional Board staff in conjunction with the Tentative Order.

management, monitoring, and reporting requirements on local government receipt of funding from the State. (See "Request" below for suggested addition to permit language to effectuate this.)

As discussed in Section II below, the Tentative Order imposes many obligations that exceed those set forth in federally-issued municipal stormwater permits, making them State mandates for "new programs and/or higher levels of service" intended to provide greater benefits to the public. Trying to improve local water quality through additional stormwater management program elements and increased service levels is undoubtedly a noble goal that Bay Area municipalities by and large share. However, there are also real limits to that which our local governments can afford due to competing priorities for local revenues (e.g., police, fire, parks) and restrictions on raising them imposed by the voters and the courts. Hence, when the Regional Board exercises *discretion* to create permit requirements that go beyond federal minimums, and in ways or at a pace with which municipalities have not endorsed, State Constitutional provisions that were enacted by voter initiative to protect local governments from unfunded State-prescribed mandates become a significant legal constraint.

Consequently, to avoid a meltdown which threatens to consume large amounts of resources on litigation that could instead be spent on water quality improvement, the Tentative Order should be revised in a manner reflecting consensus with Bay Area local governments on priorities and realistic implementation timetables (which in some cases may have to be phased into future permit terms) and/or the relevant requirements must be conditioned on the receipt of State funding guaranteed to help the municipalities staff and finance their implementation.

As practical matter, priority-setting, phasing, and State funding is also required because many of the new programs and higher levels of service envisioned in the Tentative Order are extremely expensive, staff intensive, or otherwise impracticable without such measures moderating their burden on local governments (as is explained at length in comments separately being submitted by the Bay Area municipalities, Countywide Stormwater Programs, and the Bay Area Stormwater Management Agencies Association). Indeed, Regional Board staff members have acknowledged the significant funding problems facing local governments. According to a status report issued by the Regional Board staff on February 13, 2008:

> *Another big challenge is local funding constraints due to Prop. 218, which was passed by voters in 1996 and requires a two-thirds vote to approve any increase in stormwater management fees. We recognize that Bay Area stormwater management programs are underfunded.*

The same staff report went on to outline possible funding sources, including $138 million in grant funds available under Proposition 50 for integrated regional water management planning and grant funding available under Propositions 84 and 1E to address flood control, stormwater management, and water quality. However, *possible* funding sources are not the same as assuring *actual* funding to help Bay Area municipalities implement permit

requirements, and they are undoubtedly less than what the voters required when they amended the State's Constitution to add unfunded mandate protections for local governments.

Request: Unless substantially streamlined and revised in a manner reflecting consensus with local governments on priorities and phasing, we request that the Regional Board expressly condition implementation of the items outlined in Section II below on the permittees' *actual* receipt of State funding by means of placing the following qualification language in the relevant provisions of the final permit:

> The Permittees and the Regional Board staff shall work cooperatively to obtain State funding (grant, bond, or otherwise) to address this requirement; in the event that such funding from the State is not forthcoming, the implementation deadline for this requirement shall be suspended until such time as such funds from the State are received by the Permittees, in which event implementation shall be effectuated within a time equivalent to the number of months originally provided.

Conditioning implementation of the Municipal Regional Permit's requirements in this way would not only avoid a constitutional violation and the prospect of costly litigation, it would also greatly reduce the financial strain posed by the permit and allow Bay Area municipalities to more effectively focus their efforts on addressing the highest priority water quality issues within the confines of their limited resources.

II. NUMEROUS PROVISIONS IN THE TENTATIVE ORDER CONTAIN STATE UNFUNDED MANDATES

The federal Clean Water Act does not require municipalities to perform many of the obligations imposed by the Tentative Order. It only requires municipalities to adopt: (1) effective prohibitions on non-stormwater discharges into their storm sewers and (2) controls (in the form of stormwater management programs) to reduce the discharge of pollutants to the maximum extent practicable. 33 U.S.C. § 1342(p)(3)(B). Both federal and State courts have made clear that further municipal stormwater requirements may indeed be imposed to help achieve water quality standards, but those same court decisions make equally clear that such a policy choice by a Regional Water Board is a matter of *discretion* going beyond the federal floor. *See Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159; *City of Burbank v. State Water Res. Control Bd.* (2005) 35 Cal. 4th 613.

The following provisions of the Tentative Order arise from the exercise of discretion and constitute new programs or higher levels of service going beyond federal requirements, causing them to constitute State unfunded mandates:[4]

[4] This list is not exclusive, but is comprised of some of the more burdensome requirements for local governments to implement.

- Inspection of industrial facilities directly permitted by the State or Regional Water Boards and which pay NPDES permit fees to the State to help defray the cost of administering and overseeing compliance with such permits;
- Inspection and cleaning of *all* catch basis prior to the rainy season;
- Compliance with prescriptive street sweeping/sweeper specifications;
- Mandating imposition of new development and redevelopment numeric treatment standards for projects 10,000 square feet or smaller;
- Requirement for stormwater treatment on trails, bicycle lanes, and existing road rehabilitation projects;
- Requirements for regulation of single-family home projects;
- Excessive and highly prescriptive monitoring requirements with an additional layer of monitoring/investigation activities triggered based on monitoring results and with *no upper resource limit*;
- Prescriptive pump-station pilot program (i.e., stormwater diversion from pump stations to the sanitary sewer) and associated monitoring;
- Hydromodification (peak flow regardless of pollutant content) management requirements;
- Mandatory inspection of field operations of mobile businesses such as landscapers and carpet cleaners where business is based and registered outside of co-permittee's boundary line;
- Prescriptive control measures for trash collection and management (especially purchase, installation and maintenance of full capture devices);
- Mandatory monitoring and bench marks for potable water discharges from hydrants and leaks;
- Requirement for effectuating abatement/remediation of privately-owned properties identified as having elevated levels of PCBs or mercury;
- Creation and implementation of a plan to assess and manage the discharge of PBDE; and
- Prescriptive formatting and excessive paperwork/data management and reporting requirements.

To bring forward just one concrete example from the above to illustrate the larger point, the federal Clean Water Act regulations set forth those facilities required to be inspected by municipalities. Those facilities are solely municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of Title III of the Superfund Amendment and Reauthorization Act of 1986, and industrial facilities that a municipality has determined to be contributing a substantial pollutant loading to the municipal storm sewer system. *See* 40 C.F.R. § 122.26(d)(2)(iv)(C). Unlike the Tentative Order, the federal regulations do not require inspections of additional industrial facilities or construction sites which have their own NPDES stormwater permit coverage (for which they pay fees to the State – fees that have *not* been shared with local governments to defray the costs of these delegated oversight responsibilities).

It is predictable that some will argue that the bulleted items above fall within the federal Clean Water Act's maximum extent practicable (MEP) standard, but a comparison of the municipal stormwater permit requirements the U.S. Environmental Protection Agency issues and those set forth in the Tentative Order belie that position. A municipal stormwater permit relatively recently issued by EPA Region 9 is attached as Exhibit A for purposes of facilitating such a comparison. It consists of 24 pages as opposed to 190 for the Tentative Order (of which 95 pages contain the highly prescriptive requirements to be imposed on the municipalities) and, unlike the Tentative Order, contains no 100+ page long reporting form.

Perhaps more importantly, instead of the highly prescriptive approach set forth in the Tentative Order, the EPA-issued permit also accords the subject municipalities far more discretion in determining the scope and level of implementation of the various components of their stormwater management programs, such that they can be tailored commensurate with the availability of resources. Nor is the attached EPA Region 9-issued permit unique; in fact, our review of municipal stormwater permits issued directly by EPA elsewhere in the country confirms that it is fairly typical and no EPA-issued municipal stormwater permits even approach the length or level of prescriptiveness of the Tentative Order.

Request: Exhibit B contains a more complete side-by-side comparison of EPA-issued municipal stormwater permit requirements and those set forth in the Tentative Order which constitute State unfunded mandates. We request that a response to comments address *each* row of this table individually and specifically set forth evidence of where EPA has issued an MS4 permit requirement parallel to that contained in the Tentative Order and the level of prescriptiveness/flexibility EPA accorded the subject municipality in that instance.

III. LEGAL FRAMEWORK

A. STATUTORY AND CASE LAW BACKGROUND

Section 6 of Article XIIIB of the California Constitution provides that: "Whenever the Legislature or any state agency[5] mandates a *new program* or *higher level of service* on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service ...." Cal. Const., art. XIII B, § 6 (emphasis added). Approved by California voters as Proposition 4 in 1979, Section 6 was included in Article XIIIB in recognition that Article XIIIA of the Constitution, adopted earlier through Proposition 13, severely restricted the taxing powers of local governments. *See County of Los Angeles v. State of California* (1987) 43 Cal. 3d 46, 61. Thus, the provision "was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task." *County of Fresno v. State of California* (1991) 53 Cal. 3d 482, 487; *see also County of Sonoma v. Comm'n on State Mandates* (2000) 84 Cal. App. 4th 1264, 1282 (quoting Ballot Pamp., Special Statewide Elec. at 18 (Nov. 6, 1979)) ("[S]ection 6 of Proposition 4 was intended to prevent state government attempts to 'force programs on local

[5] Regional water quality control boards are state agencies for subvention purposes. *County of Los Angeles*, 150 Cal. App. 4th at 904.

governments without the state paying for them.'"). The "central purpose of the principle of state subvention," therefore, "is to prevent the state from shifting the cost of government from itself to local agencies." *Hayes v. Comm'n on State Mandates* (1992) 15 Cal. App. 4th 1564, 1593.

Accordingly, Section 6 provides for "reimbursement," through subvention, "to local governments for the costs of complying with certain requirements mandated by the state." *County of Los Angeles v. Comm'n on State Mandates* (2007) 150 Cal. App. 4th 898, 905 (citation and alteration omitted). "Subvention" generally requires "a grant of financial assistance, or a subsidy." *Id.* at 906. The reimbursement requirement is triggered by an increase in costs that a local government is required to incur as a result of a statute, or an agency order implementing a statute, that mandates a "new program" or "higher level of service." Cal. Gov. Code § 17514; *County of Los Angeles*, 150 Cal. App. 4th at 908. In the unfunded mandates context, the term "program" refers to "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments." *County of Los Angeles*, 43 Cal. 3d at 56.

A number of obligations imposed by the Tentative Order are such programs because they are uniquely governmental functions and are expressly imposed on the municipalities that are permittees, not the general public. Many of these obligations are "new" programs because the Regional Board did not exercise its discretion to impose these requirements in earlier permits. *See County of Los Angeles v. Comm'n on State Mandates* (2003) 110 Cal. App. 4th 1176, 1189.

Moreover, even where not wholly "new," other obligations have been increased and/or made significantly more prescriptive in comparison to those set forth in prior stormwater permits the Regional Board has issued to Bay Area municipalities (and in comparison to what EPA requires of municipalities it permits), such that they constitute higher levels of service. A "higher level of service" refers to State-mandated increases in the services provided by local agencies. *County of Los Angeles*, 43 Cal. 3d at 56. A higher level of service exists where the mandate results in an increase in the "actual level or quality of governmental services provided." *San Diego Unified Sch. Dist. v. Comm'n on State Mandates* (2004) 33 Cal. 4th 859, 877.

B. THE FACT SHEET'S ASSERTION THAT THE TENTATIVE ORDER DOES NOT CONTAIN ILLEGAL UNFUNDED MANDATES IS INAPPROPRIATE AND ERRONEOUS

The Fact Sheet that accompanies the Tentative Order contains a lengthy assertion that the Order does not contain illegal unfunded mandates subject to subvention under the California Constitution. The statement exceeds the Regional Board staff's jurisdiction, reflects an advocacy position being utilized by the State Board legal staff elsewhere, is not entitled to any weight, and lacks merit in any event.

As an initial matter, the Regional Board staff's legal assertion is inappropriate because the Commission on State Mandates was established to resolve claims for subvention by local

government agencies. *See* Cal. Gov. Code §§ 17525, 17551. Only the Commission has the jurisdiction to determine, "in the *first* instance," whether a cost incurred by a local government arises from carrying out a State mandate for which subvention is required. *County of Los Angeles*, 150 Cal. App. 4th at 907, 917-18 (emphasis added); *Lucia Mar Unified Sch. Dist. v. Honig* (1988) 44 Cal. 3d 830, 837.

In addition, the staff's statements in the Fact Sheet appear to reflect advocacy positions developed by the State Board legal staff concerning unfunded mandates resulting from their unsuccessful litigation in *County of Los Angeles*, 150 Cal. App. 4th at 917-18. It is not appropriate for the Regional Board staff to include such an advocacy piece in a permit "fact" sheet. *See* 40 C.F.R. §§ 124.8, 124.56.

Furthermore, the substantive arguments in the Fact Sheet are erroneous. The staff contends that, because the MRP constitutes a federal NPDES permit and implements requirements mandated by Section 402(p)(3)(b) of the Clean Water Act, *all* obligations within the MRP are federally mandated. That argument lacks credibility on its face and is without merit.

First, as a theoretical matter, federally mandated appropriations are those "required to comply with mandates of the courts or the federal government which, *without discretion*, require an expenditure for additional services or which *unavoidably make the provision of existing services more costly*."[6] *County of Los Angeles*, 150 Cal. App. 4th at 907 (quoting Cal. Const., art. XIII B, § 9(b)) (emphasis in original). California courts "are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under *all* circumstances." *Id.* at 914 (emphasis added). In fact, the California Supreme Court has acknowledged that an NPDES permit may contain both federally mandated terms as well as terms exceeding federal law. *See City of Burbank*, 35 Cal. 4th at 618, 627-28. And other courts have found that "the potential for non-federally mandated components of an NPDES permit is acknowledged under both federal law and state law." *County of Los Angeles*, 150 Cal. App. 4th at 916. Where state-mandated activities exceed federal requirements, those mandates constitute a reimbursable state mandate. *See Long Beach Unified School District v State of California* (1990) 225 Cal. App. 3d 155, 172-73.

Second, whether an obligation imposed on a municipality results from a federal law or program does not, by itself, render that obligation a "federal mandate" for subvention purposes. Rather, "where the manner of implementation of the federal program [is] left to the true discretion of the state," the state's decision to shift the burden to municipalities gives rise to subvention. *Id.* Although the federal Clean Water Act does impose certain obligations directly on municipalities, the Tentative Order goes beyond the mandates of

[6] "There is no precise formula or rule for determining whether the 'costs' are the product of a federal mandate." *County of Los Angeles*, 150 Cal. App. 4th at 907 n.2. "A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." *City of Sacramento v. State of California* (1990) 50 Cal. 3d 51, 76.

federal law. Under the Clean Water Act, municipalities are required to (i) prohibit non-stormwater discharges into the storm sewers and (2) reduce the discharge of pollutants in stormwater to the maximum extent practicable (MEP). *See* 33 U.S.C. § 1342(p). While the Regional Board possesses authority to impose permit requirements going beyond the maximum extent practicable (MEP) to facilitate the achievement of water quality standards, *see Defenders of Wildlife*, 191 F.3d at 1163, that constitutes an exercise of discretion subjecting those requirements to the State Constitution's subvention requirement.

Likewise, in arguing that the Tentative Order is a federal mandate the Regional Board puts too much weight on the federal nature of Total Maximum Daily Load (TMDL) requirements. Although NPDES permits must contain requirements "consistent with" applicable waste load allocations (WLAs) in TMDLs, the specific manner in which the TMDL is implemented in an NPDES permit is not a federal mandate, but rather is left to the state's discretion. *See Pronsolino v. Marcus* (9th Cir. 2002) 291 F.3d 1123, 1140. Therefore, under California case law, implementation of the TMDL requirements does not cure the Tentative Order of its constitutional violation. *See Hayes*, 15 Cal. App. 4th at 1593-94.

Third, the Fact Sheet statement maintains that subvention is not required because the obligation imposed on municipalities by the Tentative Order are less stringent than the obligations imposed on some nongovernmental dischargers by other NPDES permits. The staff fails to explain how this comparative burden is legally significant or even relevant. Indeed, this argument is not relevant for purposes of subvention. Nowhere do the applicable constitutional provisions, statutes, or case law require that state mandates be more burdensome for local governments than private parties in order to trigger subvention. The single case relied upon, *County of Los Angeles v. State of California* (1987) 43 Cal. 3d 46, is completely inapposite. In that case, the California Supreme Court held that costs incurred by local agencies in providing employees with the same increase in workers' compensation benefits as employees of private entities did not require subvention because the program was administered by the state, not local governments. *Id.* at 57-58. The case simply does not support the Regional Board's proposition that "costs incurred by local agencies to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and nongovernmental discharges."

Fourth, the Fact Sheet asserts that, because the municipalities have the authority to levy service charges, fees, and other assessments to fund compliance with the Tentative Order, the Order is not an unfunded mandate. This begs the question of whether the requirement being imposed violates the State Constitution in the absence of the necessary funding being provided by the State (such that municipalities won't need to look to the local tax base). The contention that such fees are easily levied by local governments is also legally and factually incorrect. *See, e.g., Pajaro Valley Water Mgmt. Agency v. Amrhein* (2007) 150 Cal. App. 4th 1364, 1384-93; *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal. 4th 205, 215-17. In fact, the Regional Board staff has effectively acknowledged this in its February 13 status report.

Fifth, according to the Fact Sheet, the Tentative Order is not an unfunded mandate because the municipalities requested permit coverage in lieu of compliance with both numeric restrictions on their discharges and the complete prohibition against the discharge of pollutants contained in Section 301 of the Clean Water Act. There is no such request with respect to this permit in the record. Moreover, the expert panel assembled by the State Board concluded that "[i]t is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges."[7] Storm Water Panel on Numeric Limits, *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial, and Construction Activities* 8 (2006).

Finally, the Fact Sheet contends that the Tentative Order is not an unfunded mandate because the municipalities' duties pre-date the enactment of Article XIIIB, Section 6, of the California Constitution. This argument was recently rejected by the California Court of Appeal in *County of Los Angeles*. 150 Cal. App. 4th at 916 n.5. Furthermore, municipal separate storm sewer systems (MS4s) were not required to obtain NPDES permits until the 1990s, after the voters amended the State Constitution to provide municipalities with these protections.

[7] Furthermore, the case law cited in the Fact Sheet does not support the argument. For example, the staff cites *County of San Diego v. State of California* (1997) 15 Cal. 4th 68, in support of the proposition that, to the extent the municipalities have voluntarily availed themselves of the Tentative Order, the Order is not a state mandate. The case does not support that statement, however. In that case, the California Supreme Court held that counties that participated in a State healthcare program for the indigent had to spend at least as much as they received in grants from the state. *Id.* at 107-08. Participating in the healthcare program in that case was entirely voluntarily; counties could opt out completely if they wished. *Id.* By contrast, there is no opt-out opportunity for municipalities here. The Fact Sheet also relies on *Environmental Defense Center v. U.S. Environmental Protection Agency* (9th Cir. 2003) 344 F.3d 832. That case involved the Tenth Amendment of the U.S. Constitution, not subvention under the California Constitution. *Id.* at 845-48. Consequently, it is inapplicable.

EXHIBIT A

Permit No. MPS040000

AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Federal Water Pollution Control Act, as amended, (33 U.S.C. 1251 et. seq.; the "Act"),

Commonwealth of the Northern Mariana Islands
Department of Public Works
Joeten Commercial Building, Gualo Rai (Second Floor)
Saipan, MP 96950

is authorized to discharge storm water runoff and specified non-storm water discharges from the municipal separate storm sewer system (MS4) operated by the permittee to waters of the United States from all MS4 outfalls within the permitted area of the Island of Saipan,

in accordance with effluent limitations, monitoring requirements and other conditions set forth in Parts I through V, and Part VI (EPA Region 9 Standard Federal NPDES Permit Conditions for MS4 Discharges dated May 24, 1996).

This permit shall become effective on SEP 22 2006

This permit and the authorization to discharge shall expire at midnight, SEP 21 2011.

Signed this 22nd day of September, 2006

For the Regional Administrator

Alexis Strauss
Director, Water Division

TABLE OF CONTENTS

PART I. DISCHARGES AUTHORIZED UNDER THIS PERMIT

A. **PERMIT AREA.** This permit applies to all components of the MS4 owned or operated by the permittee within the boundaries of the urbanized area of the Island of Saipan, Commonwealth of the Northern Mariana Islands.

B. **AUTHORIZED DISCHARGES.** Subject to the terms of this permit, during the period beginning the effective date of this permit and lasting through the expiration of this permit, the permittee is authorized to discharge storm water and other non-prohibited discharges from all outfalls of the permittee's MS4.

C. **PROHIBITIONS -- NON-STORM WATER DISCHARGES**

1. The permittee shall effectively prohibit all types of non-storm water discharges into its MS4 unless such discharges are either authorized by a separate NPDES permit or not prohibited in accordance with Part I.C.2.

2. The following categories of non-storm water discharges (occurring within the jurisdiction of the permittee) are only prohibited if they are identified as significant contributors of pollutants to or from the MS4. If any of the following categories of discharges are identified as a significant contributor, the permittee must address the category as an illicit discharge as specified in Part II.B.3 of this permit:

   a. Water line flushing,
   b. Landscape irrigation,
   c. Diverted stream flows,
   d. Rising ground waters,
   e. Uncontaminated ground water infiltration,
   f. Uncontaminated pumped groundwater,
   g. Discharges from potable water sources,
   h. Foundation drains,
   i. Air conditioning condensate,
   j. Irrigation water,
   k. Springs,
   l. Water from crawl space pumps,
   m. Footing drains,
   n. Lawn watering,
   o. Individual residential car washing,
   p. Discharges from riparian habitats and wetlands,
   q. Dechlorinated swimming pool discharges,
   r. Street wash water,

s. Discharges or flows from emergency fire fighting activities, and
t. Additional discharges which may be developed in accordance with Part I.C.3 of this permit.

3. The permittee may also develop a list of other similar occasional incidental non-storm water discharges (e.g. non-commercial or charity car washes, etc.) that will not be addressed as illicit discharges. These non-storm water discharges must not be reasonably expected (based on information available to the permittee) to be significant sources of pollutants to the MS4, because of either the nature of the discharges or conditions the permittee has established for allowing these discharges to the MS4 (e.g., a charity car wash with appropriate controls on frequency, proximity to sensitive waterbodies, BMPs on the wash water, etc.). The permittee shall document in the storm water management program any local controls or conditions placed on the discharges, and include a provision prohibiting any individual non-storm water discharge that is determined to be contributing pollutants to the MS4.

PART II. STORM WATER MANAGEMENT PROGRAM (SWMP)

A. GENERAL REQUIREMENTS. The permittee shall implement and enforce a SWMP designed to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), to protect water quality and to satisfy water quality requirements. The SWMP shall include management practices; control techniques; system, design, and engineering methods; and other provisions EPA determines appropriate for the control of pollutants. At a minimum, the permittee shall implement the SWMP which was submitted to EPA which is dated October 25, 2004.

B. SIX MINIMUM MEASURES FOR THE SWMP

Appropriate best management practices (BMPs) to address the following six minimum control measures shall be included and implemented in the SWMP:

1. Public education and outreach on storm water impacts.

The permittee shall implement a public education program to distribute educational materials to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps that the public can take to reduce pollutants in storm water runoff.

2. *Public Involvement/Participation.*

The permittee shall, at a minimum, comply with local public notice requirements when implementing a public involvement/participation program.

3. *Illicit discharge detection and elimination.*

The permittee shall:

a. develop, implement and enforce a program to detect and eliminate illicit discharges (as defined at § 122.26(b)(2)) into the MS4;

b. develop, if not already completed, a storm sewer system map, showing the location of all outfalls and the names and location of all waters of the United States that receive discharges from those outfalls;

c. to the extent allowable under local law, effectively prohibit, through ordinance, or other regulatory mechanism, non-storm water discharges into the storm sewer system and implement appropriate enforcement procedures and actions;

d. develop and implement a plan to detect and address non-storm water discharges, including illegal dumping, to the system;

e. inform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste; and

f. address the following categories of non-storm water discharges or flows (i.e., illicit discharges) only if the permittee identifies them as significant contributors of pollutants to the MS4: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)), uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (discharges or flows from fire fighting activities are excluded from the effective prohibition against non-storm water and need only be addressed where they are identified as significant sources of pollutants to waters of the United States).

4. *Construction site storm water runoff control.*

The permittee shall develop, implement, and enforce a program to reduce pollutants in any storm water runoff to the MS4 from construction activities that result in a land disturbance of greater than or equal to one acre. Reduction of storm water discharges from construction activity disturbing less than one acre must be included in the program if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more. If the NPDES permitting authority waives requirements for storm water discharges associated with small construction activity in accordance with § 122.26(b)(15)(i), the permittee is not required to develop, implement, and/or enforce a program to reduce pollutant discharges from such sites. The program must also include the development and implementation of, at a minimum:

a. an ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under local law;

b. requirements for construction site operators to implement appropriate erosion and sediment control best management practices;

c. requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;

d. procedures for site plan review which incorporate consideration of potential water quality impacts;

e. procedures for receipt and consideration of information submitted by the public; and

f. procedures for site inspection and enforcement of control measures.

5. *Post-construction storm water management in new development and redevelopment.*

The permittee shall:

a. develop, implement, and enforce a program to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale, that discharge into the MS4. The program must ensure that controls are in place that would prevent or minimize water quality impacts;

b. develop and implement strategies which include a combination of structural and/or non-structural best management practices (BMPs) appropriate for the community;

c. use an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under local law; and

d. ensure adequate long-term operation and maintenance of BMPs.

6. Pollution prevention/good housekeeping for municipal operations.

The permittee shall:

a. develop and implement an operation and maintenance program that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from municipal operations; and

b. using training materials that are available from EPA, states, or other organizations, the program must include employee training to prevent and reduce storm water pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and storm water system maintenance.

PART III. SPECIAL CONDITIONS

A. REQUIREMENTS PERTAINING TO TOTAL MAXIMUM DAILY LOAD (TMDL) ALLOCATIONS. Pursuant to 40 CFR 122.62, this permit may be reopened and modified to include requirements of an approved TMDL and/or its associated implementation plan. Monitoring of discharges may also be required to ensure compliance with the TMDL.

B. WATER QUALITY BASED REQUIREMENTS. The permittee shall protect water quality by ensuring, to the maximum extent practicable, that no discharge shall cause or contribute to an exceedance of applicable water quality standard. To do so, the permittee shall fully implement all SWMP and permit requirements in accordance with the established time frames.

C. ENDANGERED SPECIES ACT REQUIREMENTS. This permit does not authorize nor require the construction of any particular structural storm water quality control device that could adversely affect listed or proposed threatened or endangered species.

D. REVIEWING AND UPDATING SWMPs.

1. The permittee shall annually review the SWMP in conjunction with preparation of the annual report required under Part IV.C.

2. The permittee may change the SWMP during the life of the permit according to the following procedures:

   a. Changes adding (but not subtracting or replacing) components, controls, or requirements to the SWMP may be made at any time upon written notification to EPA;

   b. Changes replacing an ineffective or infeasible management practice specifically identified in the SWMP with an alternate management practice may be requested at any time. Unless denied by EPA, changes proposed according to the criteria below are deemed approved and may be implemented 60 days after submitting the request. If the request is denied, EPA will send a written response giving a reason for the decision. Modification requests must include:

      i. An analysis of why the management practice is ineffective or infeasible (including cost prohibitive),

      ii. Expectations on the effectiveness of the replacement management practice, and

      iii. An analysis of why the replacement management practice is expected to achieve the goals of the management practice to be replaced;

   c. Change requests or notifications must be made in writing and signed in accordance with Part VI.11.

3. EPA may notify the permittee that changes to the SWMP are necessary:

   a. To address impacts on receiving water quality caused, or contributed to, by discharges from the MS4;

   b. To include more stringent requirements necessary to comply with new Federal or regulatory requirements;

c. To include other conditions deemed necessary by EPA to comply with the surface water quality standards, ESA related requirements, and/or other goals and requirements of the CWA, or

d. If, at any time, EPA determines that the SWMP does not meet permit requirements.

4. Within 60 days of receipt of an EPA notice as provided by Part III.D.3 (or a later date if so provided), the permittee must propose changes to the SWMP addressing the concerns identified by EPA and propose an implementation schedule. EPA may require revisions to the permittee's proposal. Within 30 days of EPA approval of the revised SWMP, the permittee shall incorporate the revisions into the SWMP and implement the revised SWMP in accordance with the approved schedule.

E. CNMI Water Quality Certification Requirements

1. In accordance with Section 12 of the CNMI Water Quality Standards (the "Standards"), the permittee shall allow prompt access to all facilities covered by this permit to the Director, CNMI Division of Environmental Quality or his authorized representative for the purpose of inspecting the premises for compliance with the terms of the certification. The inspection may be made with or without advance notice to the permittee, with good purpose, at the discretion of the Director, CNMI Division of Environmental Quality, but shall be made at reasonable times unless an emergency dictates otherwise.

2. In accordance with Section 10.6 of the Standards, the water quality certification requirements shall be subject to amendment or modification if and to the extent that existing water quality standards are made more stringent, or new water quality standards are adopted, by DEQ.

3. The CNMI water quality certification does not relieve the permittee from obtaining other applicable local or federal permits.

PART IV. MONITORING, RECORDKEEPING AND REPORTING REQUIREMENTS

A. MONITORING REQUIREMENTS

1. The permittee must evaluate program compliance, the appropriateness of identified best management practices, and progress toward achieving identified measurable goals. If the permittee discharges to a water for which a TMDL has

been established, the permittee may be required to monitor to determine if the storm water controls are adequate to maintain compliance with the MS4's wasteload allocation.

2. If the permittee conducts monitoring at the permitted MS4, the permittee must comply with the following:

   a. *Representative monitoring.* Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

   b. *Test Procedures.* Monitoring results must be conducted according to test procedures approved under 40 CFR Part 136.

   c. *Discharge Monitoring Report.* Monitoring results must be reported on a Discharge Monitoring Report (DMR).

3. Records of monitoring information shall include:

   a. The date, exact place, and time of sampling or measurements;

   b. The names(s) of the individual(s) who performed the sampling or measurements;

   c. The date(s) analyses were performed;

   d. The names of the individuals who performed the analyses;

   e. The analytical techniques or methods used; and

   f. The results of such analyses.

B. RECORDKEEPING

1. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, copies of Discharge Monitoring Reports (DMRs), a copy of the NPDES permit, and records of all data used to complete the application for this permit, for a period of at least three years from the date of the sample, measurement, report or application, or for the term of this permit, whichever is longer. This period may be extended by request of the permitting authority at any time.

2. The permittee shall submit its records to the permitting authority only when specifically asked to do so. The permittee must make its records, including the permit application and the description of the SWMP, available to the public if requested to do so in writing.

C. ANNUAL REPORT

1. The permittee shall submit an annual report to EPA for each year of the permit term. The first report is due September 30, 2007, covering the activities of the permittee during the period beginning on the effective date of the permit and ending June 30, 2007. Subsequent annual reports are due on September 30 of each year following 2007. The report must include:

   a. The status of compliance with permit conditions, an assessment of the appropriateness of the identified best management practices and progress towards achieving the identified measurable goals for each of the minimum control measures. The status report shall include available information concerning whether any of the permittee's discharges caused or contributed to any exceedances of water quality standards and the circumstances leading to the exceedances.

   b. Results of information collected and analyzed, including monitoring data if any, during the reporting period;

   c A summary of the storm water activities which are planned during the next reporting cycle;

   d. A change in any identified best management practice or measurable goals for any of the minimum measures;

   e. Description and schedule for implementation of additional BMPs that may be necessary, based on monitoring results, to ensure compliance with applicable TMDLs; and

   f. Notice that the permittee is relying on another government entity to satisfy some of the permit obligations (if applicable).

2. Where to Submit. Annual reports shall be submitted to EPA at the following address: EPA Region 9 (WTR-7), 75 Hawthorne Street, San Francisco, CA 94105.

PART V. DEFINITIONS

1. "Best Management Practices" (BMPs) refer to schedules of activities, prohibition of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

2. "CWA" means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub. L. 92-500, as amended by Pub. L. 95-217, Pub. L. 95-576, Pub. L. 95-483 and Pub. L. 97-117, 33 U.S.C. 1251 et seq.

3. "Director" means the Regional Administrator of EPA, Region 9 or an authorized representative.

4. "Illicit Discharge" means any discharge to a municipal separate storm sewer system that is not composed entirely of storm water except discharges pursuant to an NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges from fire fighting activities.

5. "MEP" means maximum extent practicable, the technology-based discharge standard for municipal separate storm sewer systems to reduce pollutants in storm water discharges. A discussion of MEP as it applies to small MS4s is found at 40 CFR 122.34. CWA section 402(p)(3)(B)(iii) requires that a municipal permit "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system design, and engineering methods, and other provisions such as the Administrator or the State determines appropriate for the control of such pollutants."

6. "Measurable Goal" means a quantitative measure of progress in implementing a component of a storm water management program.

7. "Municipal Separate Storm Sewer" means a conveyance, or system of conveyances (including roads with drainage systems, municipal streams, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):
(i) owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal or sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized tribal organization, or a designated and approved management agency under

section 208 of the CWA that discharges to water of the United States;
(ii) designed or used for collecting of conveying storm water;
(iii) which is not a combined sewer; and
(iv) which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

8. "Outfall" means a point source where a municipal separate storm sewer discharges to water of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

9. "Permittee" means the Department of Public Works, Saipan, Commonwealth of the Northern Mariana Islands.

10. "Point Source" means any discernible, confined and discrete conveyance, including but not limited to , any pipe, ditch, channel tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged.

11. "Representative Storm" means a storm event of greater than 0.1" of rainfall and at least 72 hours after the previously measurable (greater than 0.1" rainfall) storm event. Where feasible, the variance in the duration of the event and the total rainfall of the event should not exceed 50 percent from the average or median rainfall event in the area.

12. "Small Municipal Separate Storm Sewer System" means all separate storm sewers that are:

1. Owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States.
2. Not defined as "large" or "medium" municipal separate storm sewer systems in accordance with this permit.
3. This term includes systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison

complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings.

13. "Storm water" means storm water runoff, snow melt runoff, and surface runoff and drainage.

14. "Urbanized Area of the Island of Saipan" means the geographic area on the Island of Saipan, Commonwealth of the Northern Mariana Islands which is considered to be urbanized by the U.S. Census Bureau based on the 2000 census.

15. "Waters of the United States" means:

(a) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(b) all interstate waters, including interstate "wetlands;"
(c) all other waters such as intrastate lakes, rivers, streams (including intermittent streams, mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
(1) which are or could be used by interstate or foreign travelers for recreational or other purposes;
(2) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
(3) which are used or could be used for industrial purposes by industries in interstate commerce;
(d) all impoundments of waters otherwise defined as waters of the United States under this definition;
(e) tributaries of waters identified in paragraphs (a) through (d) of this definition;
(f) the territory sea; and
(g) wetlands adjacent to areas (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to man-made bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.

PART VI. EPA REGION 9 STANDARD FEDERAL NPDES PERMIT CONDITIONS (Revised for Municipal Storm Water Permits, May 24, 1996)

1. Duty to Reapply [40 CFR 122.21(b)]

The permittee shall submit a new application 180 days before the existing permit expires.

2. Applications [40 CFR 122.22]

a. All permit applications shall be signed as follows:

(1) For a municipality, State, Federal, or other public agency. By either a principal executive officer or ranking elected official.

b. All reports required by permits and other information requested by the Director shall be signed by a person described in paragraph (a) of this section, or by a duly authorized representative or representatives of that person. A person is a duly authorized representative only if:

(1) The authorization is made in writing by a person described in paragraph (a) of this Section;

(2) The authorization specified either an individual or a position having responsibility for the overall operation of the regulated activity or a portion of the regulated activity, or an individual or position having overall responsibility for environmental matters for the municipality. (A duly authorized representative may thus be either a named individual or any individual occupying a named position.); and

(3) The written authorization is submitted to the Director.

c. Changes to authorization. If an authorization under paragraph (b) of this section is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, or a portion of the facility, a new authorization satisfying the requirements of paragraph (b) of this section must be submitted to the Director prior to or together with any reports, information, or applications to be signed by an authorized representative.

d. Certification. Any person signing a document under paragraph (a) or (b) of this section shall make the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

3. Duty to Comply [40 CFR 122.41(a)]

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.

a. The permittee shall comply with effluent standards or prohibitions established under section 307(a) of the Clean Water Act for toxic pollutants within the time provided in the regulations that establish these standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

b. The Clean Water Act provides that:

(1) Any person who causes a violation of any condition in this permit is subject to a civil penalty not to exceed $25,000 per day of each violation. Any person who negligently causes a violation of any condition in this permit is subject to a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or both for a first conviction. For a second conviction, such a person is subject to a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or both. [Updated pursuant to the Water Quality Act of 1987]

(2) Any person who knowingly causes violation of any condition of this permit is subject to fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than three years, or by both for a first conviction. For a second conviction, such a person is subject to a fine of not more than $100,000 per day of violation, or by imprisonment of not more than six years, or both. [Updated pursuant to the Water Quality Act of 1987]

(3) Any person who knowingly causes a violation of any condition of this permit and, by so doing, knows at that time that he thereby places another in imminent danger of death or serious bodily injury shall be subject to a fine or not more than $250,000, or imprisonment of not more than 15 years, or both. A person who is an organization and violates this provision shall be subject to a fine or not more than $1,000,000 for a first conviction. For a second conviction under this provision, the maximum fine and imprisonment shall be doubled. [Updated pursuant to the Water Quality Act of 1987]

4. Duty to Mitigate [40 CFR 122.41(d)]

The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

5. Proper Operation and Maintenance [40 CFR 122.41(e)]

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

6. Permit Actions [40 CFR 122.41(f)]

The permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

7. Property Rights [40 CFR 122.41 (g)]

This permit does not convey any property rights of any sort, or any exclusive privilege.

8. Duty to Provide Information [40 CFR 122.41(h)]

The permittee shall furnish to the Director, within a reasonable time, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit or to determine compliance with this permit. The permittee shall also furnish to the Director upon request, copies of records required to be kept by this permit.

9. Inspection and Entry [40 CFR 122.41(i)]

The permittee shall allow the Director, or an authorized representative, upon the presentation of credential and other documents as may be required by law, to:

a. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

b. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

c. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

d. Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location.

10. Monitoring and Records [40 CFR 122.41(j)]

a. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

b. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least three years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.

c. The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained in this permit shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than two years per violation, or by both for a first conviction. For a second conviction, such a person is subject to a fine of not more than $20,000 per day of violation, or imprisonment for not more than four years, or both. [Updated pursuant to the Water Quality Act of 1987]

11. Signatory requirement [40 CFR 122.41(k)]

a. All applications, reports or information submitted to the Director shall be signed and certified. (See 40 CFR 122.22)

b. The CWA provides that any person who knowingly makes any false statement, representation, or certification in any record other document submitted or required to be maintained under this permit, including monitoring reports of compliance or noncompliance shall, upon conviction, be punished by a fine or not more than $10,000 per violation, or by imprisonment for not more than two years per violation, or by both for a first conviction. For a second conviction, such a person is subject to fine of not more than $20,000 per day of violation, or imprisonment of not more than four years, or both. [Updated pursuant to the Water Quality Act of 1987]

12. Reporting requirements [40 CFR 122.41(l)]

a. Anticipated noncompliance. The permittee shall give advance notice to the Director of any planned changes in the permitted facility of activity which may result in noncompliance with the permit requirements.

b. Monitoring reports. Monitoring results shall be reported at the intervals specified elsewhere in this permit.

(1) Monitoring results must be reported on a Discharge Monitoring Report (DMR) or forms provided or specified by the Director for reporting results of monitoring of sludge use or disposal practices.

(2) If the permittee monitors any pollutant more frequently than required by the permit, using test procedures approved under 40 CFR Part 136, then the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR.

(3) Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the Director in the permit.

c. Compliance schedules. Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date.

d. Twenty-four hour reporting.

(1) The permittee shall report any noncompliance which may endanger public health or the environment. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within five days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned in order to reduce, eliminate, and prevent reoccurrence of the noncompliance.

(2) The following shall be included as information which must be reported within 24 hours under this paragraph.

(i) Any unanticipated bypass which exceeds any effluent limitation in the permit. [See 40 CFR 122.41(g).]

(ii) Any upset which exceeds any effluent limitation in the permit.

3. The Director may waive the written report on a case-by-case basis for reports under paragraph (d)(2) of this section if the oral report has been received within 24 hours. Reports during normal business hours (8:00 am to 4:30 pm) should be made to the Compliance Section at telephone #415-972-3505. Twenty-four hour reporting can be made at telephone #415-947-4400.

e. Other noncompliance. The permittee shall report all instances of noncompliance not reported under the above paragraphs (c) and (d) of this section, at the time monitoring reports are submitted. The reports shall contain the information listed paragraph (d) of this section.

f. Other information. Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the Director, it shall promptly submit such facts or information.

13. Bypass [40 CFR 122.41(m)]

a. Definitions

(1) "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility. However, diversions of storm water which are consistent with the normal operation of the municipal storm sewer system shall not be considered bypasses.

(2) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

b. Bypass not Exceeding Limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs (c) and (d) of this section.

c. Notice.

(1) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, of possible at least ten days before the date of the bypass.

(2) Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in paragraph (f) of section (13) (24-hour notice).

d. Prohibition of bypass.

(1) Bypasses are prohibited, and the Director may take enforcement action against a permittee for a bypass, unless:

(i) A bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(ii) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should

have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance, and

(iii) The permittee submitted notices as required under paragraph c of this section.

(2) The Director may approve an anticipated bypass, after considering its adverse effects, if the director determines it will meet the three conditions listed above in paragraph (d) of this section.

14. Upset [40 CFR 122.41(n)]

a. Definition. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation.

b. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit effluent limitations if the requirement of paragraph (c) of this section are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

c. Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

(1) An upset occurred and that the permittee can identify the cause(s) of the upset;

(2) The permitted facility was at the time being properly operated; and

(3) The permittee submitted notice of the upset as required in paragraph 13(f) (24-hour notice).

(4) The permittee complied with any remedial measures required under 40 CFR 122.41(d).

d. Burden of proof. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

15. Termination of permits [40 CFR 122.64]

The following are causes for terminating a permit during its term, or for denying a permit renewal application:

a. Noncompliance by the permittee with any condition of the permit;

b. The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time;

c. A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination; or

d. A change in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).

16. Availability of Reports [Pursuant to Clean Water Act Section 308]

Except for data determined to be confidential under 40 CFR Part 2, all reports prepared in accordance with the terms of this permit shall be available for public inspection at the offices of the Regional Administrator. As required by the Act, permit applications, permits, and effluent data shall not be considered confidential.

17. Removed Substances [Pursuant to Clean Water Act Section 301]

Solids, sludges, filter backwash, or other pollutants removed in the course of maintenance of the MS4 shall be disposed of in a manner such as to prevent any pollutant from such materials from entering navigable waters.

18. Severability [Pursuant to Clean Water Act Section 512]

The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and remainder of the permit, shall not be affected thereby.

19. Civil and Criminal Liability [Pursuant to Clean Water Act Section 309]

Except as provided in permit conditions on "Bypass" (Section 14) and "Upset" (Section 15), nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance.

20. Oil and Hazardous Substance Liability [Pursuant to Clean Water Act Section 311]

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Clean Water Act.

21. State or Tribal Law [Pursuant to Clean Water Act Section 510]

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the operator from any legal action or relieve the operator from any responsibilities, liabilities, or penalties established pursuant to any applicable State or Tribal law or regulation under authority preserved by Section 510 of the Clean Water Act.

EXHIBIT B

Comparison Table of State and Federal NPDES MS4 Permit Requirements

State Requirement	Federal Requirement(s)	Unfunded Mandate Analysis
C. Provisions		
C. 2. Municipal Maintenance		
C.2.a. Street and Road Sweeping and Cleaning (pp. 8-9) ■ By November 30, 2008, Permittees must identify and prioritize streets and parking lots for sweeping based on use, frequency of use, and the amount of trash and debris they produce. ■ The minimum frequency of sweeping/cleaning for each category is dictated by the Permit. ■ A Permittee's existing program may be continued if it provides equivalent or greater sweeping frequency. ■ Must conduct annual surveys of street cleaning effectiveness and produce reports.	No direct equivalent in the Federal Permit. Part I.C.2 (p. 3). ■ Lists "street wash water" as a pollutant that should be prohibited, but only if it is identified by the permittee as a significant contributor of pollutants. Part II.B.6 (p. 7). ■ Requires the permittee to "develop and implement an operation and maintenance program that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from municipal operations." Saipan SWMP, p. 9, 45: ■ Found street wash water not to be a significant contributor. ■ States that the DPW is developing a good housekeeping plan for maintenance of paved roads,	The State Permit is substantially more burdensome in its requirements and provides the Permittee with no discretion in determining whether street runoff is a major problem and how to address it. The detailed requirements threaten to impose considerable expenses on the permittee above the requirements of the Federal Permit. Effectively, the State is imposing a separate street cleaning law through the NPDES MS4 permit.

	drainage systems, public facilities, and other measures.	
C.2.b. Sweeping Equipment and Selection and Operation (p.9) ■ Requires Permittees to purchase high performing sweepers capable of removing "fine particulates from impervious surfaces" when replacing existing equipment. ■ Third-party cleaners must also use high performing sweepers. ■ Sweeper operators must be provided with annual training. ■ To ensure access to curbs, Permittees must either enact and enforce parking restrictions or conduct effective public outreach. ■ Must report on sweeping methods, results, effectiveness, equipment purchases, and public outreach in annual reports.	No direct equivalent in the Federal Permit. Part I.C.2 (p. 3). ■ Lists "street wash water" as a pollutant that should be prohibited, but only if it is identified by the permittee as a significant contributor of pollutants. Part II.B.6 (p. 7). ■ Requires the permittee to "develop and implement an operation and maintenance program that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from municipal operations." Saipan SWMP, p. 9, 45: ■ Found street wash water not to be a significant contributor. States that the DPW is developing a good housekeeping plan for maintenance of paved roads, drainage systems, public facilities, and other measures.	The State Permit is substantially more burdensome in its requirements and provides the Permittee with no discretion in determining whether street runoff is a major problem and how to address it. The detailed requirements threaten to impose considerable expenses on the permittee above the requirements of the Federal Permit. Effectively, the State is imposing a separate street cleaning law through the NPDES MS4 permit.
C.2.d. Sidewalk/Plaza Maintenance and Pavement Washing (p.10)	No direct equivalent in the Federal Permit.	As with the street cleaning provisions above, this section has the potential to

■ Must implement BMPs for pavement and sidewalk cleaning that prohibits the discharge of wastewater into storm drains.		impose costs not directly imposed by the Federal MS4 Permit.
C.2.e. Bridge and Structure Maintenance and Graffiti Removal (p.10) ■ Permittees shall implement BMPs to prevent discharge from bridges and structural maintenance activities directly over water or into storm drains. ■ Must implement BMPs for graffiti removal that would prevent discharge of wash waters. ■ Shall prevent concrete, steel, wood paint, and paint chips generated from bridge or structure maintenance or graffiti removal from entering storm drains or waterways. ■ Shall protect storm drain inlets and prevent discharge of debris or waste during graffiti removal processes. ■ Must summarize compliance in an annual report.	Part II.B.6 (p. 7). Pollution prevention/good housekeeping for municipal operations ■ Permittees must reduce pollutant runoff from municipal operations including new construction and maintenance.	The Federal Permit provides Permittees with broad latitude in determining the parameters of their municipal maintenance program and makes no specific mention of graffiti or bridge maintenance. The State Permit provides no latitude for local discretion in determining how to allocate and prioritize resource expenditures.
C.2.f. Catch Basin or Storm Drain Inlet Inspection and Cleaning (p.11) ■ Permittees are required to inspect and clean all catch basins and storm	Part II.B.3(b) (p. 5). ■ Develop, if not already completed, a storm sewer system map, showing the location of all	The State Permit is considerably more burdensome and imposes heavy costs in drain inspection and maintenance, illicit discharge detection, and record keeping. None of these measures are required by

drain inlets and outfalls once per year before the rainy season. ■ Permittees must maintain maps of all storm drain inlets and outfalls. ■ Check drains for presence of illicit discharges. ■ Identify storm drain inlets with high accumulations of trash for potential retrofitting and clean those twice per year. ■ Permittees must prioritize problems areas and determine where retrofit BMPs would be most effective in preventing trash from entering storm drain systems. ■ Keep and report records of all inspections, cleaning, and maintenance logs.	outfalls. Part II.B.6 (p. 7). Pollution prevention/good housekeeping for municipal operations ■ Permittees must reduce pollutant runoff from municipal operations including new construction and maintenance.	the Federal Permit.
C.2.g. Stormwater Pump Stations (pp.11-12) ■ Permittees must develop and implement measures to operate, inspect, and maintain pump stations to eliminate non-stormwater discharges and reduce pollutants in stormwater discharges to comply with water quality standards. ■ Must inspect pump systems at least four times a year. ■ Must inspect trash racks and oil absorbent booms at stations during	Part II.B.6 (p. 7). Pollution prevention/good housekeeping for municipal operations ■ Permittees must reduce pollutant runoff from municipal operations including new construction and maintenance.	No specific requirements for the operation of stormwater maintenance systems are stated in the Federal Permit. The State Permit requirement, with its four-times-a-year inspection standard, exceeds the federal requirement and could be quite burdensome.

or within 24 hours of significant storm effects, remove debris, and replace booms as needed. ■ Must monitor dry weather and first flush flows at pump stations. ■ Must maintain and report records of inspections and maintenance. ■ Must report sampling data and monitoring data from and dry-weather sampling and first flush pump station discharges and other recommended BMPs.		
C.2.h. Rural Public Works Construction and Maintenance (pp. 12-13) ■ Permittees with rural areas must implement BMPs for erosion and sedimentation control measures when performing maintenance on public roads. ■ Permittees with rural areas must develop BMPs to minimize impacts on streams and wetlands, including: ■ Road construction, maintenance, and repair to prevent and control road-related erosion; ■ Identification and prioritization of rural roads needing increased maintenance; ■ Road and culvert designs that do not impact creek functions, prevent	Part II.B.6 (p. 7). Pollution prevention/good housekeeping for municipal operations ■ Permittees must reduce pollutant runoff from municipal operations including new construction and maintenance. Part II.B.4 (p. 6). Construction site storm water runoff control. ■ Permittee shall develop program to reduce storm water run off from construction activities that result in a land disturbance of greater than one acre. ■ Appropriate erosion and sediment controls. ■ Procedures for site plan review	The Federal Permit does not specifically address rural public works. The Federal Permit includes none of the details and management requirements found in the State Permit, all of which could be burdensome. Furthermore, the State Permit appears to go beyond the pollutant control/reduction aspects of the CWA by addressing fish passage, stream stability, and geomorphology.

fish passage, or lead to stream instability; ■ Management of stormwater runoff to reduce erosion; and ■ Inspect roads prior to the rainy season. ■ Permittees must implement BMPs to comply with WQSs, including: ■ Increase maintenance for roads adjacent to streams and riparian habitat to reduce erosion, replace damaging "shotgun culverts," re-grade roads to slope outward, and install water bars; and ■ Rehabilitate existing culverts and design new culverts and bridge crossings to reduce erosion, provide fish passage, and maintain "natural stream geomorphology in a stable manner." ■ Report BMPs and implementation of performance standards annually.	which incorporate consideration of water quality impacts.	
C.3. New Development and Redevelopment		
C.3.b. Regulated Projects (pp. 16-20) ■ Permittees must require certain projects to implement Low Impact Development ("LID") management techniques and design and install stormwater treatment systems. This provision applies to:	Part II.B.5 (p. 6). Post-construction Storm Water Management in New Development and Redevelopment. ■ Develop and enforce a program to address storm water runoff from projects that disturb *greater than or equal to one acre.*	The Federal Permit makes no mention of LID principles but instead leaves it up to the municipality to choose BMPs to reduce discharged from regulated projects. Also, there appears to be a highly significant distinction between the State Permit and the Federal Permit on the scope of project size to be regulated by

■ Commercial and industrial development projects that create or replace 10,000 square feet or more of impervious surface; ■ Residential housing subdivisions, multi-family attached subdivisions, mixed-use, and public projects that create or replace 10,000 square feet or more of impervious surface; and ■ Newly constructed trails, streets, roads, or highways (including contiguous sidewalks and bicycle lanes) that create or replace 10,000 square feet or more of contiguous impervious surface. ■ On July 1, 2010, all references to 10,000 square feet change to 5,000 square feet. ■ Permittees must maintain a database of all approved regulated projects and annually report on projects.		the MS4. The State Permit applies to projects of 10,000 square feet or larger, while the Federal Permit applies to projects of an acre (43,560 square feet) or larger. This distinction will only grow larger when, after four years, the State regulation extends to certain types of projects 5,000 square feet and larger. The Federal Permit makes no mention of constructing or maintaining a database or annually reporting detailed information on specific projects. Given that the State Permit requires regulation of and recordkeeping on projects a quarter, and later an eighth, of the size of those regulated by the Federal Permit, there seems to be little question that this is a significantly higher level of service than that required by the Federal Permit.
C.3.c. Low Impact Development (LID) (pp. 20-21) ■ Permittees must require all regulated projects to integrate LID into project design, including: ■ Source control requirements – use of sanitary sewers for certain commercial and industrial activities, covers and drains for	Part II.B.5 (p. 6). Post-construction Storm Water Management in New Development and Redevelopment. ■ Develop and enforce a program to address storm water runoff from projects that disturb *greater than or equal to one acre*. ■ Develop and implement strategies including structural and non-	As explained above, the Federal Permit does not mention LID principles but instead leaves it up to the municipality to choose BMPs to reduce discharges from regulated projects. Moreover, some of the LID practices, such as those dealing with landscaping and conserving natural areas, seem more like zoning requirements than pollution-reduction requirements.

outdoors storage and fueling areas, properly design trash storage areas, specified landscaping, irrigation systems, and storm drain stenciling/signage; ■ Site design requirements – conservation of natural areas and existing trees, minimization of impervious footprint, and proper drainage from impervious areas; and ■ Stormwater treatment requirements – reduce runoff, store stormwater for beneficial reuse, enhanced infiltration, and natural stormwater treatment features like landscape-based bioretention systems.	structural BMPs appropriate for community.	
C.3.d. Numeric Sizing Criteria for Stormwater Treatment Systems (pp. 21-23) ■ Permittees must require that stormwater treatment systems for regulated projects meet one of the following hydraulic sizing criteria: Volume Hydraulic Design, Flow Hyrdraulic Design, Combination Flow and Volume Design. ■ Limits the use of infiltration devices.	No equivalent in the Federal Permit	This requirement is not found in the Federal Permit. To the extent that it applies to regulated projects smaller than one acre, it is also a higher level of service.
C.3.g. Hydromodification Management (pp. 26-30)	Part II.B.5 (p. 6). Post-construction Storm Water Management	The Federal Permit is concerned with reducing pollutants in stormwater, not with the increased erosive power resulting

■ Creates BMPs to reduce runoff flow and volume of discharges from HM Projects -- regulated projects that create or replace one acre or more of impervious surface. ■ Stormwater discharges from HM Projects must not cause an increase in the erosion potential of the receiving stream.	■ Permittee shall develop a program to address pollutants in storm water runoff from new projects greater than or equal to one acre . . . The program must ensure that controls are in place that would prevent or minimize water quality impacts.	from the stormwater flow. By requiring permittees to develop not only a plan to reduce pollutants in stormwater, but also a plan to prevent the increase of the erosive potential of the stormwater discharge, the State Permit's extensive hydromodification conditions place heavy burdens on municipalities that are not contemplated by the Federal Permit. Thus, this provision is a new program or higher level of service.
C.3.h. Operation and Maintenance of Stormwater Treatment Systems (pp. 30-32) ■ Permittees must implement an Operation and Maintenance (O&M) Verification Program. ■ Permittees must create a prioritized plan for inspecting all installed stormwater treatment systems every 5 years. ■ Requires inspection of all new systems within 45 days of installation. ■ Results of inspection reports must be included in the Permittee's annual report.	Part II.B.5.d (p. 7). Post-construction Storm Water Management ■ Ensure adequate long-term operation and maintenance of BMPs.	The State Permit's requirements go beyond and are more prescriptive and burdensome than the Federal Permit's requirement of long-term maintenance of BMPs.
C.3.i. Detached Single-Family Home Projects (pp. 32-33) ■ Permittees must require all single-	No equivalent in the Federal Permit.	This requirement in the State Permit constitutes an entirely new program component going beyond the Federal Permit. Administering and enforcing these

family home projects that create or replace 5,000 square feet or more of impervious surface to implement one of the following BMPs: divert roof runoff to vegetated areas, direct paved surface runoff to vegetated areas, install driveways, patios, and walkways with pervious materials.		requirements could be burdensome for municipalities.
C.3.j. Collection of Impervious Surface Data for Small Projects (pp. 33-34) ■ Permittees must jointly propose a regional pilot study in which representative Permittees will develop and maintain a database for all new and redevelopment projects that create between 1,000 and 10,000 square feet of impervious surface.	No equivalent in the Federal Permit.	This provision constitutes a new program component going beyond the Federal Permit by the State. As explained above, the Federal Permit only applies to projects larger than one acre, so projects of 1,000 square feet are considerably outside of its scope. Moreover, the Federal Permit at no point mandates creation of a pilot program or a database of new and redevelopment projects.
C.4. Industrial and Commercial Site Controls		
C.4.a.-d. Program for the Inspection of Industrial and Commercial Facilities (pp. 35-41) ■ Permittees are required to have legal enforcement authority to obtain effective stormwater pollutant control on industrial and commercial sites, including the	Part II.B.3.d (p. 5). Illicit Discharge Detection and Elimination ■ Permittee shall develop and implement a plan to detect and address non-storm water discharges, including illegal dumping, to the system.	In comparison to the Federal Permit, the State Permit dramatically increases the number of sites subject to inspection, which would increase Permittees inspection workload (a higher level of service). The State Permit also requires Permittees to inspect sites permitted by the State Board. Thus, the provision exceeds the Federal Permit, forces

ability to impose civil and criminal sanctions and monetary penalties for noncompliance. ■ Permittees must enforce or revise local ordinances to maintain compliance. ■ Permittees must develop Inspection Plans and inspect all commercial and industrial facilities that that could contribute to the pollution of stormwater runoff. ■ Adds business categories and increases inspection frequencies for industrial and commercial facilities currently permitted by the State Board. ■ Inspection must include mobile businesses such as landscapers and carpet cleaners in the field. ■ A list of applicable facilities must be developed and facilities must be prioritized based on the potential impact on water quality. ■ Inspection frequency depends on the prioritization category of the site, with inspections required every 1 to 5 years. ■ Permittees must develop and employ an Enforcement Response Plan (ERP) for responding to violations. ■ Permittees must provide annual training for inspectors.	Saipan SWMP, p. 39: ■ DEQ Wastewater and NPS branch . . . have implemented a permanent OSDS Compliance Inspection Program to identify failing on-site disposal systems. The systems being inspected are marked with a GPS and entered into a database tracking system for future inspections.	municipalities to carry out enforcement activities that the State Board has the responsibility of performing, and requires a higher level of service than the current State Permit.

C.5. Illicit Discharge Detection and Elimination		
C.5.b. Create and Maintain Enforcement Response Plan (pp. 42-44) ■ Permittee shall develop an ERP with a range of enforcement capabilities.	Part II.B.3.c (p. 5). Illicit Discharge Detection and Elimination ■ Permittee shall to the extent allowable under local law effectively prohibit through ordinance, or other regulatory mechanism, non-storm water discharges into the storm sewer system and implement enforcement procedures and actions.	The provisions of the State Permit are more prescriptive and add cost.
C.5.c. Spill and Dumping Response, Complaint Response, and Frequency of Inspections (p. 44) ■ Requires Permittees to have a central contact point, including phone numbers for complaints and spill reporting. ■ Requires agencies develop a response flow chart and phone tree for internal use. ■ Requires Permittees to conduct reactive inspections in response to complaints.	Part II.B.3.d (p. 5). Illicit Discharge Detection and Elimination ■ Permittee shall develop and implement a plan to detect and address non-storm water discharges, including illegal dumping, to the system. Saipan SWMP, p. 40: ■ Public reporting procedures will be developed for direct telephone reporting and the reporting telephone number will be included on CNMI Agency informational materials.	These provisions of the State Permit are more prescriptive and the reactive inspection requirement constitutes a new program in addition to a higher level of service to the extent it deprives the Permittees of discretion.

C.5.e. Tracking and Case Follow-Up (p. 45) ■ Requires Permittees to track complaints.	Part II.B.3.d (p. 5). Illicit Discharge Detection and Elimination ■ Permittee shall develop and implement a plan to detect and address non-storm water discharges, including illegal dumping, to the system. Saipan SWMP, p. 39: ■ DEQ Wastewater and NPS branch . . . have implemented a permanent OSDS Compliance Inspection Program to identify failing on-site disposal systems. The systems being inspected are marked with a GPS and entered into a database tracking system for future inspections.	This provision is more prescriptive than the Federal Permit to the extent it deprives the Permittees of discretion to determine which complaints to track.
C.5.f. Illicit Discharge Control Plan (pp. 45-46) ■ Requires Permittees to assess their illicit discharge control plans based on lessons learned from past year.	Part II.B.3.d (p. 5). Illicit Discharge Detection and Elimination ■ Permittee shall develop and implement a plan to detect and address non-storm water discharges, including illegal dumping, to the system.	This is not required by the Federal Permit.
C.5.g. Staff Training (p. 46)	Saipan SWMP, p. 40:	These provisions are more prescriptive

■ Permittees must conduct an individual training program or region-wide inspector training once per year, or conduct inspector's networking meetings three times per year.	■ DPW will conduct an annual Illicit Detection Interagency Coordination Program.	than the Federal Permit.
C.6. Construction Inspections		
C.6.a-h. Construction Inspection Program (pp. 47-53) ■ Permittees must implement a construction site inspection program with adequate follow-up and enforcement. ■ Increases inspection frequencies. ■ Permittees must develop and employ an ERP to prevent construction site discharges of pollutants. ■ ERPs must include progressively stricter responses for noncompliance. ■ Permittees must designate a minimum set of BMPs and other measures for all construction sites. ■ Permittees must review erosion control plans before issuance of grading and construction permits, perform routine inspections, provide training for inspectors, and track stormwater inspections and	Part II.B.4 (p. 6). Construction Site Storm Water Runoff Control ■ Permittee shall develop an ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance. ■ Requirements for construction site operators to implement appropriate erosion and sediment control best management practices. ■ Procedures for site plan review which incorporate consideration of potential water quality impacts. ■ Procedures for site inspection and enforcement of control measures.	The State Permit goes beyond and is more prescriptive than the requirements in the Federal Permit. It also requires the Permittees to inspect sites subject to the State Board's General Permit without sharing those permits fees.

enforcement actions.		
C.7. Public Information and Outreach		
C.7.a. Storm Drain Inlet Marking (p. 54) ■ Permittees must mark at least 90% of storm drains to prevent pollution. ■ Markings must be inspected at least once every five years.	Saipan SWMP, p. 45: ■ DPW will stencil "Storm Water Only" on all DPW Inlet Structures.	These provisions go beyond and are more prescriptive than the Federal Permit (particularly with respect to a more urbanized area); the addition of inspections is a significant new program component.
C.7.b. Advertising Campaign / Media Buys (p. 54) ■ Permittees must participate in or contribute to an advertising campaign with the goal of increasing awareness of pollution prevention. ■ Advertising campaigns must target two pollutants of concern – trash and pesticides. ■ Survey assessments must be conducted to measure overall awareness of the message.	Part II.B.1 (p. 4). Public Education and Outreach on Storm Water Impacts ■ The permittee shall implement a public education program to distribute educational materials to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps that the public can take to reduce pollutants in storm water runoff. Saipan SWMP, p. 28: ■ PSAs tell how to prevent NPS pollution from motorized vehicles. ■ Educate residents that driving on the beach is harmful to the environment.	The State Permit requirements are considerably more prescriptive than the Federal Permit, which deprives the Permittees of discretion and thereby imposes a higher level of required service.
C.7.c. Media Relations – Use of Free Media (pp. 54-55)	Saipan SWMP, p. 29:	The State Permit is more prescriptive than the Federal Permit and deprives the

■ Permittees should maximize their use of free media to increase awareness of stormwater pollution prevention. ■ Permittees should conduct a minimum of six pitches per year at the countywide or regional level.	■ Episode of Teen Talk Live featuring Kate Moots discussing coral reef issues.	Permittees of discretion; the specific number of pitches requires a higher level of service.
C.7.e. Public Outreach Events (p. 55) ■ Participate in and/or host events such as fairs, shows, workshops, etc., to reach a broad spectrum of the community. ■ The number of outreach events shall increase with the size of the population: 2 events annually for a city of 10,000 or less, 3 events annually for a city of 10,001-40,000, 4 events annually for a city of 40,001-100,000, 5 events annually for a city of 100,000-175,000, 6 events annually for a city of 175,000-250,000, and 8 events annually for a city of more than 250,000.	Saipan SWMP, p. 29: ■ Annual Environmental Symposium (2-day symposium).	The State Permit is both more extensive and burdensome than the Federal Permit.
C.7.g. Citizen Involvement Events (pp. 56-57) ■ Permittees must support citizen involvement events such as	Saipan SWMP, p. 29: ■ Monthly beach clean-ups.	The State Permit's provisions are more prescriptive and require a higher level of service.

creek/shore clean-ups, etc. ■ Permittees must participate in or host a minimum number of events, depending on population.		
C.7.h. School-Age Children Outreach (p. 57) ■ Permittees must implement outreach activities designed to increase awareness in school-age children.	Saipan SWMP, p. 29: ■ Clarence the Coconut Crab (CD presentations with Teacher script and notes) ■ Presentations to students on various environmental issues, career options, etc.	The State Permit's provisions are more prescriptive and require a higher level of service.
C.7.k. Outreach to Municipal Officers (p.58) ■ At least once per permit cycle, Permittees must conduct outreach to regional municipal officers through the Nonpoint Education for Municipal Officials (NEMO) program to significantly increase overall awareness of stormwater "messages."	Part II.B.3(e) (p. 5) The Permittee shall "inform public employees, businesses, and the general public of hazards associates with illegal discharges and improper disposal of waste."	The State Permit's provisions are far more prescriptive and require a higher level of service.
C.7.l. Research Surveys, Studies, Focus Groups (p. 58) ■ To implement the advertising campaigns discussed in Provision C.7.b, Permittees must identify and quantify audiences, knowledge, attitudes, practices, and trends.	No equivalent in the Federal Permit.	These research surveys are expensive and not required by the Federal Permit, and therefore could be considered a new program.

C.8 Water Quality Monitoring		
C.8.a-i. Water Quality Monitory Standards (pp. 59-76) ■ Permittees must conduct Status Monitoring. ■ Permittees may comply through collaboration on regional studies. ■ Sets forth the technical details for Status Monitoring. ■ Specifies which water bodies should be monitored. ■ Mandates long-term trends monitoring, with specified locations, parameters, methods, and frequencies. ■ Requires monitoring of Pollutants of Concern at specific locations and frequencies and in compliance with EPA guidelines. ■ Requires additional monitoring/investigation activities triggered based on monitoring results with no upper resource limit. ■ Requires several additional monitoring projects. ■ Citizen monitoring and participation must be encouraged. ■ Comprehensive reports must be submitted annually.	Part IV (p. 9). Monitoring Requirements ■ Permittee must evaluate program compliance, the appropriateness of identified best management practices, and progress toward achieving identified measurable goals. ■ If the permittee discharges to a water for which a TMDL has been established, the permittee may be required to monitor to determine if the storm water controls are adequate. ■ Shall perform the following monitoring activities: Representative monitoring, Test Procedures in compliance with 40 CFR § 136, Discharge Monitoring Report. ■ Must retain records of all monitoring information. ■ Shall submit records to permitting authority. ■ Shall submit an annual report to EPA for each year of the permit term, including compliance with permit conditions, results of information collection, summary of storm water activities planned, changes in BMPs, and description	The State Permit's water quality monitoring requirements are considerably more detailed, prescriptive, and expensive than the federal requirements. The inclusion of triggers, which could require additional activities based on monitoring results with no upper resource limit, constitute new program components that are potentially expensive and difficult to manage.

	of schedule for implementing BMPs.	
C.8.e.iii. Dry Weather Discharges & First Flush Investigations (pp. 68-70) ■ To identify the pump stations that are the most significant sources of dry weather pollutants, Permittees must collect grab samples from specific, listed pump stations during early summer and early fall, as well as during storm events. ■ Samples must be analyzed for certain contaminants and pump stations must be ranked based on both contamination and likelihood to receive runoff exposed to mercury and PCB pollutants.	No equivalent in the Federal Permit.	These requirements are a new program not required by the Federal Permit.
C.9 Pesticides Toxicity Prevention		
C.9.a-h. Pesticides Toxicity Control (pp. 77-79) ■ Permittees must implement a pesticide toxicity control program that addresses its own use of pesticides and the use of pesticides within its jurisdiction. ■ Permittees must adopt and implement an Integrated Pest Management (IPM) policy, train municipal employees on IMP procedures, and require contractors to implement IPM policies.	Part III.B (p. 7). Water Quality Based Requirements (presumed applicable per TMDL) ■ Permittee shall protect water quality by ensuring, to the maximum extent practicable, that no discharge shall cause or contribute to an exceedance of applicable water quality standards. To do so, the permittee shall implement all SWMP and permit requirements in accordance with established time frames.	To the extent that pesticides are regulated pollutants subject to TMDL monitoring, the Federal Permit requires that they be monitored. Similarly, BMPs that reduce pesticide pollutant runoff from regulated areas would fall within the Federal Permit. The rest of the expenses contained in this provision exceed the requirements of the Federal Permit. The fact that the State Permit involves limiting all pesticide use, not simply curbing pesticide runoff, also suggests that this a higher level of service than that

■ Permittees must track federal and state activities regarding the evaluation and registration of pesticides. ■ Permittees must work with county agricultural commissioners to get input and assistance on urban pest management practices. ■ Annual evaluation of the implementation of source control actions relating to pesticides must occur. ■ Permittees must conduct outreach to consumers regarding pesticide usage at the point of purchase.		required by the Federal Permit. Additionally, the State Permit arguably requires limiting all pesticide use, not just pesticides that have been determined to be threats to water quality.
C.10 Trash Reduction		
C.10.a-d. Enhanced Trash Management Program (pp. 80-82) ■ Permittees must implement a pilot enhanced trash management control program, which requires identifying high trash and litter impact catchments totaling 10 percent of the land area within their jurisdictions, ■ Permittees must implement Enhanced Trash Management Controls, which include increased street sweeping effectiveness and frequency, enhanced inlet inspection and cleaning, increased	No equivalent Federal Permit provision.	The program will be extremely expensive for Permittees to implement and no funding is provided for its components, including the highly prescriptive requirements to install certain capture devices. The State Permit's extensive inspection requirements also far surpass anything explicitly stated in the Federal Permit or the Saipan SWMP. It is also troubling that the State Permit requires municipalities to shoulder the costs of a pilot program. The Federal Permit does not reference any such

cleanup of illegal dumping incidents, maintenance of adequate litter receptacles in high-traffic areas, and increased public outreach on litter and trash controls. ■ Permittees must install full trash capture devices. ■ Permittees must assess trash in waterways downstream of catchments using specified methods. ■ Trash management plans must have the goal of no impact of trash on beneficial uses by 2023. ■ Permittees must report annually.		programs. If the State wants to try out such a program, the State should pay for it.
C.11. Mercury Controls		
C.11.a-i. Mercury Control Program (pp. 83-86) ■ Permittee must facilitate proper collection, recycling, and disposal of mercury-containing devices. ■ Samples taken in compliance with other provisions must be analyzed for methylmercury. ■ Permittees must test sediments in storm drains and conveyances—including private property, public rights of way, and stormwater conveyances—to determine mercury concentrations. ■ Permittees must determine which sites require abatement—including	Part III.B (p. 7). Water Quality Based Requirements (presumed applicable per TMDL) ■ Permittee shall protect water quality by ensuring, to the maximum extent practicable, that no discharge shall cause or contribute to an exceedance of applicable water quality standards. To do so, the permittee shall implement all SWMP and permit requirements in accordance with established time frames.	State Permit conditions requiring Permittees to conduct studies and pilot projects to evaluate different abatement measures are highly prescriptive, limit discretion, exceed the federal requirements, and could be very costly. Additionally, requiring flows to be diverted to the sanitary sewer is a new program not contemplated in the Federal Permit, could be infeasible, costly, and inconsistent with the TMDL and Basin Amendment Plan, and could have a deleterious effect on water quality.

private property, public rights of way, and stormwater conveyances—and propose remedial activities. ■ Permittees must evaluate ways to enhance existing municipal street sweeping, inlet cleaning, catch basin cleaning, and pump station cleaning via increased effort and/or retrofits. ■ A pilot project for installing on-site treatment systems must be implemented. ■ Permittees must study the feasibility of diverting stormwater flows to the sanitary sewer. ■ Permittees must develop and implement a monitoring program to quantify mercury loads and reductions achieved through source control, treatment, and management. ■ Diversion of dry weather and first flush flows to publicly owned treatment works – must evaluate feasibility of diverting flows to the sanitary sewers to be treated by local publicly owned treatment works. ■ Permittees must conduct studies to gain a better understanding of fate, transport, and biological uptake of mercury discharged into the Bay.		

C.12. PCB Controls		
C.12.a-i. PCB Control Program (pp. 87-91) ■ Permittees must implement a program to incorporate the identification of PCBs and PCB-containing equipment into existing industrial inspections. ■ Permittees must evaluate the potential presence of PCBs at construction sites and evaluate current regulations regarding material handling and disposal (e.g., municipal ordinances, RCRA, TSCA). ■ Permittees must develop a plan for sampling PCBs at demolition sites and develop BMPs to reduce or prevent discharges of PCBs at demolition and renovation sites. After BMPs are developed, Permittees must test BMPs at five sites. ■ Permittees must develop a pilot project to investigate and abate on-land drainages, including private property, public rights-of-way, and stormwater conveyances with accumulated sediments that have elevated PCB concentrations. ■ Permittees must conduct a pilot project to evaluate and enhance municipal sediment removal and	Part III.B (p. 7). Water Quality Based Requirements (presumed applicable per TMDL) ■ Permittee shall protect water quality by ensuring, to the maximum extent practicable, that no discharge shall cause or contribute to an exceedance of applicable water quality standards. To do so, the permittee shall implement all SWMP and permit requirements in accordance with established time frames. Saipan SWMP, p. 23-24. CNMI Water Quality Standards Act Part 7, Basic Water Quality Criteria Applicable to All Waters: (a) All surface waters shall be free of substances attributable to domestic, industrial, or other controllable sources of pollutants and shall be capable of supporting desirable aquatic life and be suitable for recreation in and on the water.... (4) High temperatures; biocides; pathogenic organisms; toxic; corrosive; or other deleterious substances at levels or in combinations sufficient to be toxic or	As with the mercury provisions, State Permit conditions mandating Permittees to conduct studies and pilot projects to evaluate different measures or reduce pollution are highly prescriptive, reduce discretion, exceed the federal requirements, and again could be very costly. Additionally, requiring flows to be diverted to the sanitary sewer is a new program not contemplated in the Federal Permit, could be infeasible, costly, and inconsistent with the TMDL and Basin Amendment Plan, and could have a deleterious effect on water quality.

management practices. ■ Permittees must conduct a pilot project to evaluate on-site stormwater treatment. ■ Permittees must develop and implement a monitoring program to quantify PCB loads and reductions achieved through source control, treatment, and management. ■ Diversion of dry weather and first flush flows to publicly owned treatment works – must evaluate feasibility of diverting flows to the sanitary sewers to be treated by local publicly owned treatment works. ■ Permittees must conduct studies to gain a better understanding of fate, transport, and biological uptake of PCBs discharged in urban runoff.	harmful to human health or aquatic life.	
C.13. Copper Controls		
C.13.a-e. Copper Control Program (pp. 92-94) ■ Permittees must enact local ordinances to prohibit the discharge of waste into storm drains from copper architectural features (e.g., copper roofs) and enforce those ordinances. ■ Permittees must require the use if BMPs when issuing building	No equivalent in the Federal Permit.	These State Permit conditions mandate Permittees to conduct studies and pilot projects in prescriptive ways that exceed federal requirements and could be costly. Additionally, requiring the adoption and enforcement of ordinances is a new program that exceeds federal requirements.

permits. ■ Permittees must adopt and enforce ordinances that prohibit discharges from pools, spas, and fountains that contain copper-based chemicals into storm drains. ■ Permittees must participate in the Brake Pad Partnership and track upcoming decisions regarding brake pad copper content. ■ Permittees must identify industrial sources using copper (e.g., plating facilities, metal finishers, auto dismantlers) and educate industrial inspectors. Inspectors must ensure that proper BMPs are in place to minimize discharges from these sources into storm drains. ■ Permittees must conduct studies to investigate the toxicity of copper sediments.		
C.14. Polybrominated Diphenyl Ethers (PBDE), Legacy Pesticides and Selenium		
C.14.a. Control Program for PBDEs, Legacy Pesticides, and Selenium (p. 95) ■ To determine if urban runoff is a conveyance mechanism associated with the possible impairment of the Bay for PBDEs, legacy pesticides, and selenium, Permittees are required to work with the other	No equivalent in the Federal Permit.	The State here is effectively requiring the Permittees to determine whether the substance needs to be regulated, which is the work of the permitting agency and constitutes a new program for which no funding is being provided.

stormwater management agencies in the region to implement a plan to identify, assess, and manage controllable sources of those contaminants found in urban runoff, if any. ■ Provide information on pollutants to allow calculation of TMDLs from urban runoff conveyance systems.		
C.15. Exempted and Conditionally Exempted Discharges		
C.15.a. Exempted Non-Stormwater Discharges (p.96) ■ The following unpolluted discharges are exempted from prohibition of non-stormwater discharges: flows from riparian habitats or wetlands, diverted stream flows, flows from natural springs, rising ground waters, uncontaminated groundwater infiltration, and NPDES permitted discharges. C.15.b. Conditionally Exempted Non-Stormwater Discharges (pp. 96-102) ■ Describes a tiered categorization of non-stormwater discharges, based on potential for pollutant content, which may be discharged upon	The Federal Permit has no prescriptive requirements. Part I.C.2. (pp. 3-4). Discharges Authorized Under this Permit ■ The following categories of non-stormwater discharges are only prohibited if they are identified as significant contributors of pollutants to or from the MS4: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration, uncontaminated pumped groundwater, discharges from potable water sources, foundation drains, air conditioning condensate, irrigation water, springs, water from crawl space	The Federal Permit authorizes discharges unless the municipality determines they warrant prohibition or BMPs (the nature and extent of which the municipality is left free to define). The State Permit reverses the Federal Permit's presumptive discharge authorization, requires the municipality to affirmatively find that a discharge is not a significant source of pollution, and imposes highly prescriptive BMPs and discharge monitoring requirements. Unless the language of this Provision is modified to grant Permittees discretion to determine which BMPs and control measures are appropriate to address a threat posed to water quality, these overly prescriptive, inflexible, and burdensome requirements constitute a new program or higher level of service than that required

adequate assurance that the discharge does not contain pollutants of concern at concentrations that will impact beneficial uses or cause exceedances of water quality standards. ■ The following non-stormwater discharges are exempted from the prohibition of non-stormwater discharges if they are identified by the Permittees as not being sources of pollutants to receiving waters or if appropriate control measures to eliminate adverse impacts are implemented: (1) pumped groundwater, foundation drains, water from crawl space pumps, and footing drains; (2) air conditioner condensate; (3) planned, unplanned, and emergency discharges from the potable water system, including hydrant flushing and water line breaks; (4) individual residential car washing; (5) swimming pools, hot tubs, spas, fountain waters; and (6) water used for irrigation or gardening. ■ Requires discharge benchmarks and water quality monitoring for planned and unplanned discharges from the potable water supply, including drinking water, hydrant	pumps, footing drains, lawn watering, individual residential car washing, discharges from riparian habitats and wetlands, dechlorinated swimming pool discharges, street wash water, discharges or flows from emergency fire fighting activities.	by Federal law.

flushing, and line breaks. Affects all water retailers. ■ For each of the six types of discharge described above, the Permit requires prescriptive BMPs and control measures, including: (1) treatment (including filtration) before discharge to remove pollutants (including total suspended solids and silt), compliance with existing effluent limitations, detailed and frequent monitoring, turbidity reduction, and maintenance of neutral pH; (2) discharge of condensate to the ground or sanitary sewer; (3) dechlorination, erosion and sediment control measures, notification of planned discharges, monitoring of planned and unplanned discharges for pH, chlorine, and turbidity, reporting of unplanned and emergency discharges, plugging of storm drain collection system and proper disposal for emergency discharges; (4) discouragement of residential car washing through public outreach; and (5) disposal of discharge from pools and spas to the sanitary sewer unless properly dechlorinated. ■ Requires inspection of mobile		

businesses, such as landscapers and carpet cleaners, in the field.		

MEMORANDUM

TO: San Francisco Regional Water Quality Control Board

FROM: Morrison & Foerster LLP on behalf of the Santa Clara Valley Urban Runoff Pollution Prevention Program and its Co-Permittees[1]

DATE: February 28, 2008 FILE: 43117-1

RE: **Legal Comment (No. 2) Concerning Discharge Prohibition A.2 and Provision C.1 of Proposed Municipal Regional (Stormwater) Permit**

The following comment concerning Discharge Prohibition A.2 and Provision C.1 of the proposed Municipal Regional Permit is being submitted on behalf of the Santa Clara Valley Urban Runoff Pollution Prevention Program and its 15 members who are designated as co-permittees.[12]

I. Discharge Prohibition A.2 and Provision C.1 Must Be Revised.

Discharge Prohibition A.2 and Provision C.1 of the Tentative Order, as drafted, are contrary to State Water Resources Control Board (State Board) precedential orders that are directly on point – and the provisions are against public policy. It therefore would be an abuse of discretion for the Regional Board to adopt the Tentative Order without first revising these provisions as described below.

A. Discharge Prohibition A.2 and Provision C.1 Do Not Comply With State Board Precedent.

1. Provision C.1 as Currently Drafted Violates State Board Order WQ 1999-05 and Needs to be Revised Accordingly.

[1] The co-pemittees are: Campbell, Cupertino, Los Altos, Los Altos Hills, Los Gatos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, Sunnyvale, Santa Clara County, and the Santa Clara Valley Water District.

[2] The Santa Clara Program will be submitting additional comments under its own letterhead, and its 15 members who are co-permittees may be submitting separate programmatic, technical, and/or legal comments as well. All of these, and any comments submitted by other Bay Area municipal stormwater programs and co-permittees (and/or their legal counsel) and the Bay Area Stormwater Management Agencies Association (BASMAA), are hereby incorporated by reference.

In Discharge Prohibitions A.1 and A.2, the Tentative Order requires that Permittees prohibit the discharge of non-exempted non-stormwater (A.1) and rubbish and other solid wastes in stormwater and non-stormwater (A.2) into storm drain systems and surface waters. However, unlike its approach within Discharge Prohibition A.1, as currently drafted, the Tentative Order does not expressly address how compliance with Discharge Prohibition A.2 is to be effectuated vis-à-vis the implementation Provisions of the permit. The Tentative Order also currently neglects to include references to both Discharge Prohibitions A.1 and A.2 in the first paragraph of Provision C.1, in both places where Receiving Water Limitations B.1 and B.2 are referenced.

These omissions place the Tentative Order in direct violation of State Board Order WQ 1999-05,[3] a precedential order requiring that municipal stormwater permits tie discharge prohibitions to the implementation of control measures, by which Permittees' compliance with the permit can be determined.[4] With respect to the first paragraph of Provision C.1, the State Board Order specifically requires that municipal stormwater permits include the following language: "The permittees shall comply with *Discharge Prohibitions [ ] and* Receiving Water Limitations [ ] through timely implementation of control measures and other actions to reduce pollutants in the discharges..." Order WQ 1999-05, ¶ 3 (emphasis added).

Request: We therefore request that the words "Discharge Prohibitions A.1 and A.2 and" be added before "Receiving Water Limitations" in the first and third sentences of the first paragraph of Provision C.1 as shown in italics immediately below:

> The Permittees shall comply with *Discharge Prohibitions A.1 and A.2 and* Receiving Waters Limitations B.1 and B.2 through the timely implementation of control measures and other actions to reduce pollutants in the discharge of stormwater runoff. The Permittees shall implement control measures and Best Management Practices (BMPs) to reduce pollutants in stormwater discharges to the maximum extent practicable in accordance with the requirements of this Permit, including any modifications. The performance standards specified in Provisions C.2 through C.15 are designed to achieve compliance with *Discharge Prohibitions A.1 and A.2 and* Receiving Waters Limitations B.1 and B.2 through implementing management practices, specifying level of implementation, and requiring timely and complete reporting to enable determination of compliance with the specified performance standards.

[3] Available at http://www.swrcb.ca.gov/resdec/wqorders/1999/wqo99-05.html

[4] Precedential decisions and orders provide guidance for later decisions and orders. A Regional Water Board cannot reverse a State Water Board precedent. http://www.swrcb.ca.gov/resdec/index.html.

2. Discharge Prohibition A.2 as Currently Drafted Violates State Board Order WQ 2001-15.

State Board Order WQ 2001-15[5] refines Order WQ 1999-05 by requiring an iterative approach to compliance with water quality standards that involves assessments and revisions over time. The Tentative Order as drafted violates this State Board Order by omitting from Discharge Prohibition A.2 any reference to Provisions C.1 through C.17, which provide the practices by which discharge prohibitions are implemented and evaluated. The State Board specifically rejected this very approach to drafting of a discharge prohibition in a municipal stormwater permit in Order WQ 2001-15: "[t]he permit must be clarified so that the reference to the iterative process for achieving compliance applies not only to the receiving water limitation, *but also to the discharge prohibitions* that require compliance with water quality standards." State Board Order WQ 2001-15, p. 16 (emphasis added).[6]

Request: Accordingly, we request the sentence "Compliance with this prohibition shall be demonstrated in accordance with Provisions C.1 through C.17 of this Permit" be added to Discharge Prohibition A.2 as shown in italics immediately below:

> It shall be prohibited to discharge rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they would contact or where they would eventually transported to surface waters, including flood plain areas. *Compliance with this prohibition shall be demonstrated in accordance with Provisions C.1 through C.17 of this Permit.*

B. As Currently Drafted, Provision C.1 and Discharge Prohibition A.2 Are Contrary to Sound Public Policy

In addition to violating these two precedential State Board Orders, the Tentative Order as drafted are contrary to sound public policy. By failing to fully tie the Discharge Prohibitions to the Provisions of the permit and iterative process, the Tentative Order essentially asks the Municipalities to make continued and significantly increased investments in their stormwater management and monitoring programs while concurrently setting them up for enforcement actions (potentially including citizens' lawsuits in federal court) and penalties *even if they fully fund, staff, and comply with every single implementation provision of the permit.*

Bay Area municipalities deserve better than this Catch-22. The Regional Board must avoid this absurd and unfair outcome and instead require that staff tie the permit's Discharge Prohibitions (both A.1 *and* A.2) and Provision C.1 together as described above, and as required by State Board precedent.

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[5] Available at http://www.swrcb.ca.gov/resdec/wqorders/2001/wq2001_15.pdf

[6] Here, the appropriate reference to the iterative approach is already included in Prohibition A.1, so the deficiency that needs to be addressed is with A.2.